

STATE OF MICHIGAN
COURT OF APPEALS

SALLY STANFORD,

Plaintiff-Appellant,

v

TROST IRRIGATION, INC.,

Defendant-Appellee.

UNPUBLISHED

March 18, 2003

No. 239153

Oakland Circuit Court

LC No. 00-024680-NO

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition and denying her motion for leave to amend her complaint. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff slipped and fell on an icy walkway on her employer's premises. She claimed that the ice formed from water deposited on the walkway while defendant was emptying the pipes of the automatic sprinkler system in preparation for winter. She filed this action for damages, seeking to hold defendant liable under a premises liability theory. The trial court dismissed the complaint, finding that defendant did not have possession and control of the premises or the walkway. It denied plaintiff leave to amend to allege a new theory of liability.

Plaintiff first contends that the trial court erred in granting summary disposition. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions, and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

Premises liability is conditioned on possession and control of the property. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). Possession is the right to exercise control to the exclusion of all others. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002). While possessory rights can be loaned to another, thereby transferring

the duty of care from the owner to the borrower, *Anderson v Wiegand*, 223 Mich App 549, 555-556; 567 NW2d 452 (1997), a contractor's entry onto land to perform work for the owner does not establish a transfer of possession and control absent some evidence of same, such as a provision in the contract to that effect. *Derbabian*, *supra* at 703-704.

Plaintiff alleged in her complaint that Brookside Management owned the premises. She showed that defendant was on the premises to perform work for Brookside. There was no evidence that Brookside had actually ceded possession and control of the premises to defendant as opposed to retaining possession and control while allowing defendant to enter. See *Derbabian*, *supra* at 704, n 5. Therefore, the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff next contends that the trial court erred in denying her motion for leave to amend her complaint. The trial court's ruling on a motion to amend pleadings is reviewed for an abuse of discretion. *Doyle v Hutzel Hosp*, 241 Mich App 206, 211-212; 615 NW2d 759 (2000). An abuse of discretion "occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999), quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), and *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

If the court grants a motion for summary disposition pursuant to MCR 2.116(C)(10), it must "give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). After the time for amendment as of right has expired, a party may amend a pleading only by leave of the court or upon consent of the adverse party. The court shall freely grant leave when justice so requires. MCR 2.118(A)(2).

The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. Leave to amend may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment. Delay, alone, does not warrant denial of a motion to amend. However, a motion may be properly denied if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. Prejudice to a defendant that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the defendant from having a fair trial; the prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. [*Amburgey v Sauder*, 238 Mich App 228, 246-247; 605 NW2d 84 (1999) (citations omitted).]

Here, the motion was made more than a year after plaintiff filed her complaint and after the close of discovery and after case evaluation. While defendant knew that plaintiff was seeking to hold it liable for injuries sustained when she fell due to a dangerous condition created by defendant, defendant had no notice before the motion that it would be called on to defend a

new cause of action based on negligent performance of a contractual duty as opposed to failure to protect plaintiff from an unsafe condition on the premises. Under the circumstances, the court's ruling was not an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997); *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 488; 652 NW2d 503 (2002).

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Hilda R. Gage